No. 18-8064

IN THE SUPREME COURT OF THE UNITED STATES

FERNANDO LUVIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

ERIC S. DREIBAND
Assistant Attorney General

BONNIE I. ROBIN-VERGEER
TERESA KWONG
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court plainly erred in instructing the jury on the federal-jurisdiction element of 18 U.S.C. 1519, which makes it a crime to knowingly falsify any record or document "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 906 F.3d 784.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 2018. A petition for rehearing was denied on November 15, 2018. The petition for a writ of certiorari was filed on February 13, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of deprivation of rights under color of law, in violation of 18 U.S.C. 242, and knowingly falsifying a document with the intent to impede, obstruct, or influence a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. 1519. Judgment 1. The district court sentenced petitioner to 84 months of imprisonment, to be followed by three years of supervised release. Ibid. The court of appeals affirmed. Pet. App. 1-11.

1. In 2011, petitioner was on duty as a deputy sheriff at the Los Angeles County Men's Central Jail when Gabriel Carrillo and Carrillo's girlfriend, Griselda Torres, came to the jail to visit Carrillo's brother. Pet. App. 1-2. After Carrillo and Torres passed through security, Torres was taken to a breakroom for a pat-down search to determine whether she had impermissibly brought a cellphone into the jail. Id. at 2; Gov't C.A. Br. 5-6. Officers found two cellphones on her, and she told them that Carrillo had also brought a cellphone. Pet. App. 2; Gov't C.A. Br. 6. An officer located Carrillo in the visitor's area, handcuffed his hands behind his back, and brought him to the breakroom, where he was also searched. Pet. App. 2.

When Carrillo asked why he was being searched, the officer conducting the search lifted Carrillo's arms into the air behind

him "so he could feel some pain." Pet. App. 2. Carrillo, upset at the treatment, said to his girlfriend that "[i]f [he] wasn't in handcuffs, this would be a different situation." Ibid. Overhearing this, one of the officers radioed for additional officers to come to the breakroom. Ibid. Petitioner and two fellow officers responded. Ibid. The officer who had overheard Carrillo's comment told petitioner and his colleagues that Carrillo said that, "if he wasn't in handcuffs, he'd take flight on us," meaning that Carrillo would fight them. Ibid. The officers then removed Torres from the room and proceeded to beat Carrillo while he was handcuffed. Ibid.

Specifically, petitioner punched Carrillo in the face and, with another officer, knocked him to the ground. Pet. App. 2. Petitioner and the other officer then punched Carrillo repeatedly in the head, back, ribs, and thighs as he lay on the floor. Ibid. Meanwhile, a supervising officer who had been watching the beating summoned additional officers. Ibid. Two more officers arrived and joined petitioner in punching and kicking Carrillo. Ibid. Petitioner also pepper-sprayed Carrillo in the face, burning his open wounds and making it difficult for him to breathe. Ibid. Carrillo suffered bone fractures, head and facial trauma, a broken nose, and multiple lacerations and bruises. Ibid. Carrillo remained handcuffed throughout the assault. Ibid.

After the assault, petitioner and his fellow officers created a false paper trail of official reports in which the officers claimed that Carrillo had attacked them after one of his hands was uncuffed for fingerprinting and that the "officers' use of force * * * had been necessary to subdue a combative and resistant suspect." Pet. App. 2. Petitioner personally prepared a "report[] repeating the agreed-upon cover story." Ibid. In the report, petitioner falsely stated that one of Carrillo's hands had been uncuffed and that Carrillo had instigated the incident by punching petitioner and ripping and pulling petitioner's shirt. Gov't C.A. Br. 15-16.

As a result of the false reports, Carrillo was charged in state court with assaulting an officer and attempting to escape from custody. Pet. App. 3. The cover-up fell apart, however, and the state charges were dropped after text messages came to light in which one of the officers involved in the assault bragged about beating Carrillo. Ibid.

2. In 2013, a grand jury in the Central District of California charged petitioner and other officers with several offenses stemming from the assault. Indictment 1-15. Petitioner ultimately went to trial on one count of willfully depriving Carrillo of his federal rights under color of law, in violation of 18 U.S.C. 242, and one count of knowingly falsifying a document with the intent to impede, obstruct, or influence the investigation

and proper administration of a matter within the jurisdiction of the U.S. Department of Justice, in violation of 18 U.S.C. 1519. First Superseding Indictment 7-8.

The parties jointly proposed an instruction on the elements of a violation of 18 U.S.C. 1519, which the district court accepted. Gov't C.A. Br. 61. The court instructed the jury:

> In order for a defendant to be found guilty [of violating Section 1519], the government must prove each of the following elements beyond a reasonable doubt with respect to that particular defendant:
>
> 1. The defendant knowingly falsified or made false entries into a record, document, or tangible object;
>
> 2. The defendant acted with the intent to impede, obstruct, or influence an investigation or proper administration of any matter that he either knew of or contemplated; and
>
> 3. The investigation or matter was within the jurisdiction of the United States Department of Justice or [the] Federal Bureau of Investigation.
>
> The government is not required to prove that the defendant knew about a pending federal investigation or intended to obstruct a specific federal investigation, but the government is required to prove beyond a reasonable doubt that the matter or investigation at issue was within the federal government's jurisdiction.

Jury Instructions 19. The jury was further informed that the parties had stipulated that "[a]llegations of civil rights violations, including unjustified force by law enforcement officers acting under color of law, are, pursuant to Title 18, United States Code, Sections 241 and 242, matters within the jurisdiction of the United States Department of Justice and the

Federal Bureau of Investigation." D. Ct. Doc. 223, at 2 (June 17, 2015).

The jury found petitioner guilty on both counts. Pet. App. 2. The district court sentenced him to 84 months of imprisonment, to be followed by three years of supervised release. Judgment 1.

3. The court of appeals affirmed. Pet. App. 1-11.

As relevant here, petitioner contended in his opening brief that the evidence was insufficient to support his conviction under 18 U.S.C. 1519 because the government did not prove that he "acted with the intent to obstruct an actual or contemplated investigation by the United States." Pet. C.A. Br. 49 (capitalization and emphasis altered). The government maintained in response that petitioner had waived that contention by jointly proposing a jury instruction that did not require such proof and that petitioner had in any event failed to show any plain error. Gov't C.A. Br. 61-62.

In his reply brief, petitioner acknowledged that "[t]he government did not have to prove that he knew the investigation was federal." Pet. C.A. Reply Br. 14. He contended, however, that on the specific facts of this case, where "there were two investigations" -- the initial state prosecution of Carrillo and the later federal investigation of petitioner and the other officers -- the government had failed to prove that petitioner acted with the intent to obstruct or influence the federal rather

than state investigation. Id. at 14-16. Petitioner later argued, in a letter submitted under Federal Rule of Appellate Procedure 28(j), that the government was required to prove a "federal nexus" by showing that it was "'reasonably likely'" that his false report would reach a federal officer. 4/5/18 Pet. C.A. Ltr. 1-2 (quoting United States v. Johnson, 874 F.3d 1078, 1083 (9th Cir. 2017)).

The court of appeals rejected petitioner's arguments. Pet. App. 7. The court determined that "a rational jury could conclude that the evidence showed * * * that the defendants contemplated an investigation into their use of excessive force and falsified their reports to obstruct or impede such an investigation." Ibid. The court further determined that -- unlike the different statute, 18 U.S.C. 1512(b)(3), at issue in the circuit precedent cited in petitioner's Rule 28(j) letter -- "Section 1519 does not contain an element requiring" proof of a nexus between the obstructive conduct and a federal investigation. Ibid.; see Johnson, 874 F.3d at 1081. The court explained that, under Section 1519, "it is enough for the government to prove that the defendant intended to obstruct the investigation of any matter as long as that matter falls within the jurisdiction of a federal department or agency." Pet. App. 7.

ARGUMENT

Petitioner contends (Pet. 10-16) that the court of appeals erred in declining to read a "nexus" element into 18 U.S.C. 1519.

That contention does not warrant this Court's review. The court of appeals correctly determined that Section 1519 does not require proof of the sort that petitioner posits, and its decision does not conflict with any decision of this Court or another court of appeals. This case would, in any event, be an unsuitable vehicle to consider the question petitioner seeks to present because he jointly proposed a jury instruction that did not include a nexus element like the one he now proposes. Accordingly, the petition for a writ of certiorari should be denied. See Fontenot v. United States, 562 U.S. 1273 (2011) (No. 10-7385) (denying review of a similar question).

1. Section 1519 imposes criminal liability on any person who "knowingly * * * falsifies[] or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States * * * or in relation to or contemplation of any such matter." 18 U.S.C. 1519. Although this Court has not directly addressed the element of Section 1519 requiring that the investigation or matter be "within the jurisdiction of any department or agency of the United States," ibid., in United States v. Yermian, 468 U.S. 63 (1984), the Court addressed identical language in 18 U.S.C. 1001 (1982). At the time, Section 1001 imposed criminal liability on any person who, "in any matter within

the jurisdiction of any department or agency of the United States knowingly and willfully * * * makes any false, fictitious or fraudulent statements or representations." 18 U.S.C. 1001 (1982) (emphasis added). The Court in Yermian explained that the phrase "'within the jurisdiction of any department or agency of the United States'" was "a jurisdictional requirement," the purpose of which was "to identify the factor that makes the false statement an appropriate subject for federal concern." 468 U.S. at 68. And the Court held that the statute "unambiguously dispense[d] with any requirement" that the government prove that the false statements "were made with actual knowledge of federal agency jurisdiction." Id. at 69-70.

The Court explained that this conclusion would be "equally clear" if -- as is the case with Section 1519 -- the "jurisdictional language * * * appeared as a separate phrase at the end of the description of the prohibited conduct." Yermian, 468 U.S. at 69 n.6. The predecessor to Section 1001, which prohibited "knowingly and willfully" making "any false or fraudulent statements or representations, . . . in any matter within the jurisdiction of any department or agency of the United States," ibid. (citation omitted), was worded nearly identically to the present Section 1519. The Court stated that the "most natural reading of this version of [Section 1001] also establishes that 'knowingly and willfully' applies only to the making of false

or fraudulent statements and not to the predicate facts for federal jurisdiction." Ibid.; see United States v. Feola, 420 U.S. 671, 676-686 (1975) (knowledge that victim is federal officer not required for conviction of assaulting federal officer in violation of 18 U.S.C. 111).

There is no reason to interpret Section 1519 any differently. Section 1519 was enacted nearly 20 years after Yermian. See Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 800. "[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [this Court's] precedents and . . . that it expect[ed] its enactments to be interpreted in conformity with them." North Star Steel Co. v. Thomas, 515 U.S. 29, 34 (1995) (citation and some brackets omitted). Thus, when Congress crafted Section 1519 using language and structure similar to that of Section 1001 (and its predecessor), Congress presumptively intended Section 1519 to be interpreted in the same way that this Court had interpreted Section 1001 in Yermian. That inference is further bolstered by this Court's continued adherence to the general rule, exemplified by Yermian, that proof of mens rea is typically unnecessary for jurisdictional elements. See Torres v. Lynch, 136 S. Ct. 1619, 1631 (2016) (citing Yermian and Feola).

The legislative history of Section 1519 confirms Congress's intent. Congress enacted Section 1519 in part to "expand[] prior

law by including within the provision's reach 'any matter within the jurisdiction of any department or agency of the United States.'" Yates v. United States, 135 S. Ct. 1074, 1081 (2015) (plurality opinion) (quoting S. Rep. No. 146, 107th Cong., 2d Sess. 14-15 (2002) (Senate Report)). The relevant committee report stated that Section 1519 "is specifically meant not to include any technical requirement * * * to tie the obstructive conduct to a pending or imminent proceeding or matter," and that knowingly "[d]estroying or falsifying documents to obstruct any of [various] types of matters or investigations" would be covered by the statute as long as the matter or investigation is "in fact * * * proved to be within the jurisdiction of any federal agency." Senate Report 14-15; see also 148 Cong. Rec. 14,449 (2002) (statement of Sen. Leahy) ("The fact that a matter is within the jurisdiction of a federal agency is intended to be a jurisdictional matter, and not in any way linked to the intent of the defendant.").

Accordingly, every court of appeals to consider the question has, like the Ninth Circuit here, interpreted the relevant language in Section 1519 ("any matter within the jurisdiction of any department or agency of the United States") as a jurisdictional requirement, as to which the defendant's knowledge or intent is irrelevant. See Pet. App. 7; United States v. McQueen, 727 F.3d 1144, 1152 (11th Cir. 2013) ("There is nothing in the language that says the defendant must * * * know that any possible

investigation is federal in nature."); United States v. Gray, 692 F.3d 514, 519 (6th Cir. 2012) ("[T]he plain language of the statute only requires the Government to prove that [the defendant] intended to obstruct the investigation of any matter that happens to be within the federal government's jurisdiction."), cert. denied, 568 U.S. 1148 (2013); United States v. Moyer, 674 F.3d 192, 208-209 (3d Cir.) ("The government * * * need not prove that [the defendant] actually knew that the 'matter' at issue was within the jurisdiction of the federal government when he falsified documents. It need only prove that he knowingly falsified them.") (footnote omitted), cert. denied, 568 U.S. 846 (2012), and 568 U.S. 1143 (2013); United States v. Yielding, 657 F.3d 688, 714 (8th Cir. 2011) ("It is sufficient that the 'matter' is within the jurisdiction of a federal agency as a factual matter."), cert. denied, 565 U.S. 1262 (2012); United States v. Gray, 642 F.3d 371, 378 (2d Cir. 2011) ("By the plain terms of § 1519, knowledge of a pending federal investigation or proceeding is not an element of the obstruction crime."); cf. United States v. McRae, 702 F.3d 806, 835 (5th Cir. 2012) (finding no plain error in a Section 1519 instruction and observing that the statute "appears to make the relationship between the United States and the matter being obstructed a jurisdictional relationship").

2. Petitioner errs in contending (Pet. 14-16) that Section 1519 includes an additional "nexus" requirement that was omitted from the agreed-upon jury instructions here.

At times, petitioner suggests that the government should have been required to prove that he falsified his report in "contemplation of a federal matter." Pet. 14; cf. Pet. 9 (arguing "that the government did not present evidence that he intended to impede a federal investigation, as opposed to the state matter"). To the extent petitioner argues that a conviction under 18 U.S.C. 1519 requires proof that the defendant knew the matter or investigation he intended to impede was a matter or investigation within federal jurisdiction, that argument does not warrant this Court's review. Any such requirement would be inconsistent with the text of the statute, its legislative history, this Court's construction of comparable language in Yermian, and the uniform view of the courts of appeals. See pp. 8-12, supra. Indeed, petitioner himself recognized below that "[t]he government did not have to prove that he knew the investigation was federal." Pet. C.A. Reply Br. 14.

At other times, petitioner suggests that the government should have been required to prove that "there was a 'reasonable likelihood' that the falsified reports were written to impede a possible federal investigation," rather than a state or local matter. Pet. 1; cf. Pet. 9-10. The court of appeals also correctly

rejected that alternative proposed "nexus" requirement for Section 1519, which petitioner raised for the first time below in a post-briefing letter under Rule 28(j). Pet. App. 7; see pp. 6-7, supra.

Petitioner's "reasonable likelihood" proposal is drawn from an inapposite discussion in Fowler v. United States, 563 U.S. 668 (2011). See Pet. 9, 16 (citing Fowler). That case concerned the federal witness-tampering statute, which makes it a crime to "kill[] or attempt[] to kill another person, with intent to * * * prevent the communication by any person to a law enforcement officer * * * of the United States of information relating to the commission or possible commission of a Federal offense." 18 U.S.C. 1512(a)(1)(C). A related subsection provides that "no state of mind need be proved with respect to the circumstance * * * that the law enforcement officer is an officer or employee of the Federal Government." 18 U.S.C. 1512(g)(2).

In Fowler, the Court addressed how Section 1512(a)(1)(C) applies when a defendant kills a victim with the intent to prevent communication about the commission of a federal offense "to law enforcement officers in general rather than to some specific law enforcement officer," thus leaving potential ambiguity about whether the defendant intended to prevent a communication to an officer who (whether or not known to the defendant) was a federal officer. 563 U.S. at 672 (emphasis omitted). Reasoning that "one cannot act with an 'intent to prevent' something that could not

possibly have taken place regardless," the Court looked to "the dictionary definition of the word 'prevent'" to answer that question. Id. at 674-675. And it ultimately held that, in a case in which the defendant does not have particular officers in mind, the government "must show a reasonable likelihood that had, e.g., the victim communicated with law enforcement officers, at least one relevant communication would have been made to a federal law enforcement officer." Id. at 677.[1]

The court of appeals correctly determined that Section 1519, in contrast, "does not contain an element requiring such proof." Pet. App. 7. Section 1519 does not use the term "prevent," on which the Court focused in Fowler, see 563 U.S. at 674-675. Like the similar language considered in Yermian, the relevant language of Section 1519 is solely a "jurisdictional requirement" intended "to identify the factor that makes the false [report] an appropriate subject for federal concern." 468 U.S. at 68. Section

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[1] This Court has interpreted certain other obstruction of justice statutes to require a nexus between the obstructive conduct and a federal proceeding. See Marinello v. United States, 138 S. Ct. 1101, 1109-1110 (2018) (26 U.S.C. 7212(a)); Arthur Andersen LLP v. United States, 544 U.S. 696, 707-708 (2005) (18 U.S.C. 1512(b)); United States v. Aguilar, 515 U.S. 593, 599-600 (1995) (18 U.S.C. 1503). Petitioner adverts to Arthur Andersen in passing (see Pet. 16) but otherwise does not rely on those decisions, which in any event concerned materially different statutory language. Indeed, the legislative history of Section 1519 indicates that the provision was purposefully drafted to avoid the "loopholes and burdensome proof requirements" that legislators perceived as problems with existing law. Senate Report 6-7 (discussing 18 U.S.C. 1503, 18 U.S.C. 1512(b), and Aguilar).

1519, by its plain terms, requires only that the defendant falsify a document with the intent to impede, obstruct, or influence a matter that happens to fall within federal jurisdiction. Pet. App. 7. The statute does not also require proof that a federal investigation was reasonably likely, nor that the defendant was aware of or acted in contemplation of that specific possibility. Here, petitioner violated the statute when he deliberately falsified his report to impede and obstruct an investigation into his use of force against Carrillo -- a matter that petitioner stipulated to be within the jurisdiction of the Department of Justice. See p. 5, supra; see also Pet. App. 7.

3. Petitioner incorrectly asserts (Pet. 10-14) that the courts of appeals are divided over whether Section 1519 contains a "nexus" element of the sort he posits. No court of appeals has interpreted Section 1519 in the manner he proposes. See Gray, 692 F.3d at 519 (explaining that a "nexus requirement" would be inconsistent with "the plain language of the statute"); Moyer, 674 F.3d at 209 (concluding "that proof of such a nexus is not required"); see also pp. 11-12, supra. Petitioner does not dispute that every court of appeals to consider the question has "held that the term 'knowingly' modifies only the actus reus" in Section 1519, not the "requirement that the matter be within the jurisdiction of a federal agency." Pet. 12, 13; accord Pet. C.A. Br. 51 (recognizing that "no court has held that the term

'knowingly' modifies the jurisdictional requirement that the matter be within the jurisdiction of a federal agency"). And he identifies no decision interpreting Section 1519 to require proof of a "reasonable likelihood" of a federal investigation.

Petitioner argues (Pet. 13) that the Sixth Circuit has "implied that the intent element requires the government to prove intent to influence a federal investigation, as opposed to another type of investigation," but the decisions he identifies contain no such suggestion. In United States v. Kernell, 667 F.3d 746, cert. denied, 568 U.S. 826 (2012), the Sixth Circuit stated that the government must prove "intent to impede, obstruct or influence an investigation." Id. at 756 (emphasis added). And in its later decision in Gray, the Sixth Circuit confirmed that Section 1519 does not require the government to prove that the defendant "intended to obstruct a federal investigation" but only that the defendant "intended to obstruct the investigation of any matter that happens to be within the federal government's jurisdiction." 692 F.3d at 519.

Petitioner's reliance (Pet. 13) on United States v. Hunt, 526 F.3d 739 (11th Cir. 2008), is equally misplaced. Hunt did not involve any question of whether Section 1519 requires proof of the defendant's intent to obstruct or impede a federal investigation; rather, in addressing the defendant's challenge to the sufficiency of the evidence, the Eleventh Circuit simply determined that the

evidence showed that the defendant knew claims of excessive force would be investigated by federal agents, without suggesting that specific knowledge of the federal identity of the investigators was required. Id. at 745. And to the extent Hunt might have created any ambiguity, the Eleventh Circuit's later decision in McQueen made clear that the "'any matter within the jurisdiction of any department or agency of the United States'" language in Section 1519 is "merely a jurisdictional element" for which "'no proof of mens rea is necessary.'" 727 F.3d at 1152 (brackets and citation omitted).

4. In any event, this case would be an unsuitable vehicle to consider the question petitioner seeks to present. Because petitioner himself jointly proposed the jury instructions that did not include petitioner's "nexus" element, see p. 5, supra, he cannot now adopt a contrary position. See Gov't C.A. Br. 60-61 (arguing waiver). At a minimum, petitioner must demonstrate plain error to obtain any relief. Fed. R. Crim. P. 52(b). To satisfy that standard, petitioner would be required to show that (1) the district court committed an "error"; (2) the error was "clear" or "obvious"; (3) the error affected his "substantial rights"; and (4) the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." United States v. Olano, 507 U.S. 725, 732-736 (1993) (citations omitted). Petitioner cannot make that showing here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

ERIC S. DREIBAND
Assistant Attorney General

BONNIE I. ROBIN-VERGEER
TERESA KWONG
Attorneys

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